

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL
PRODUCTION OF PLAINTIFF'S WORKING MODELS AND INTEGRATED BRIEF
IN SUPPORT [DKT #1721] AND REQUEST FOR COSTS**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma, and Oklahoma Secretary of the Environment, C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma (the "State"), hereby submits this reply in opposition to "Defendants' Motion to Compel Production of Plaintiffs' [sic] Working Models and Integrated Brief in Support" [DKT #1721] on the ground that the State has fully complied with any discovery obligations that it may have under the Rules. For the reasons set forth below and in the State's Motion to Strike Defendants' Motion to Compel [DKT # 1727], Defendants' Motion to Compel should be denied in its entirety.

BACKGROUND

1. On or about April 17, 2008, Defendant Tyson Foods, Inc.'s served Requests for Production on the State regarding expert models ("Modeling RFPs").

2. On May 15, 2008, the State produced, in advance of the Court's deadline, a large portion of the considered materials of Drs. Engel and Wells, including modeling materials that had been finalized.

3. On May 19, 2007, the State timely responded to the Modeling RFPs. *See* Exhibit A. Understandably, because the Court had granted extensions to the State's modeling experts, the State could not produce some of the requested expert modeling materials until the completion of these expert reports. This included the expert reports and underlying modeling materials of Drs. Engel and Wells, which had not previously been produced on the May 15, 2008 expert-report deadline.

4. Dr. Engel's report and the remaining underlying considered materials were timely produced on May 22, 2008. As of this date, the materials responsive to the Modeling RFPs for Dr. Engel's modeling work were produced to Defendants.

5. On May 28, 2008 -- one day before the due date for Dr. Wells' materials -- counsel for Tyson inquired regarding certain aspects of the State's production of the modeling information. Counsel for the State asked Defendants to provide a list of the information their experts required in writing so that the State could inquire of its experts regarding the same.

6. Dr. Wells' report and the remaining underlying materials were timely produced on May 29, 2008. As of this date, the materials responsive to the Modeling RFPs for Dr. Wells' modeling work were produced to Defendants.

7. On May 30, 2008, counsel for Tyson provided a list of files that Defendants' experts believed necessary for evaluation of the modeling work conducted by the State's experts. *See* Exhibit B. Counsel for the State informed Defendants that he would consult with the State's experts and check the materials produced in order to ensure the State had provided that information and that he would provide a Supplemental Response to the Modeling RFPs that would specifically identify which of the produced materials responded to the particular Requests and the list of file types provided by Defendants in Exhibit B.

8. On Tuesday, June 10, 2008, counsel for the State again assured Defendants' counsel that the Supplemental Response was forthcoming. Counsel for the State explained that this information would show Defendants' counsel and their modeling expert that the requested files *had already been produced* and that these files could be used to run the water quality models used by Drs. Engel and Wells. But instead of waiting on counsel for the State, and in an improper effort to bolster Defendants' Motion for Additional Time to Produce Expert Reports and Integrated Brief in Support [DKT #1722], Defendants filed their Motion to Compel seeking the same information that they had previously been provided.

9. On June 13, 2008, as promised to Defendants' counsel before the filing of their Motion to Compel, the State -- going above and beyond its discovery obligations -- supplemented the Response to the Modeling RFPs to fully explain what had been produced and the format and organization in which the files had been produced so that the State's modeling files could be easily understood by Defendants' experts. *See Exhibit C.*

10. Because Defendants' Motion was premature and sought sanctions, the State was forced to file a Motion to Strike Defendants' Motion to Compel [DKT # 1727], which is hereby incorporated by reference.

11. But even before filing that motion to strike, counsel for the State contacted the attorney who filed Defendants' Motion to discuss whether Defendants objected to the relief sought by the State's Motion to Strike. The State was met with further requests for information and told that upon responding, Defendants would *consider* withdrawing their Motion to Compel. *See Exhibit D.*

12. Counsel for the State responded to Defendants' questions the following business day. *See Exhibit E.*

13. Defendants remained silent regarding their intent to withdraw their Motion to Compel.

14. As the deadline to respond to Defendants' Motion to Compel drew nearer, on Wednesday, June 25, 2008, counsel for the State again reached out to Defendants' counsel in an effort to avoid wasting this Court's time with further briefing and argument of these issues. *See* Exhibit F.

15. On Thursday, June 26, 2008, Defendants responded with new questions regarding the modeling files. *See* Exhibit G. Moreover, Defendants specifically requested to be allowed direct access to the computers belonging to the State's experts. *Id.* Counsel for the State responded to their question the same day and again requested that Defendants withdraw their Motion. *See* Exhibit H.

16. The State fully and completely responded to Defendants' Modeling RFPs and more than fully complied with its obligations regarding identification of the materials considered by all of its experts, including but not limited to Drs. Wells and Engel.

17. On June 27, 2008, Defendants submitted an entirely new request. They requested to depose Dr. Engel and Dr. Wells for one day in the next two weeks to obtain information regarding their modeling work and stated their intent to conduct a second day of depositions at some undisclosed future time to further examine these experts on their results and substantive opinions.¹ *See* Exhibit I.

ARGUMENT

¹ While the State objects to Defendants' request to take multiple depositions of its experts, Defendants' Motion to Compel is not a living breathing document that should be allowed to morph at Defendants' choosing. As a result the State has not substantively responded to this eleventh hour request in this Opposition.

Defendants' Motion to Compel seeks both information already in their possession and sanctions for failure to provide Defendants with expert materials in the format of their choosing. Defendants' Motion is simply an abuse of an otherwise valid remedy under the Rules. Defendants should not be allowed to conduct themselves in this manner. Their Motion should be denied.

First, as set forth in the State's Motion to Strike [DKT #1722], Defendants' Motion to Compel was prematurely filed before an impasse was reached with regard to the materials sought. For that reason alone, Defendants' Motion to Compel should be denied. *See, e.g., Burton v. R.J. Reynolds Tobacco Co.*, 203 F.R.D. 624, 625 (D. Kan. 2001) (overruling motion to compel, in part, because moving attorney failed to meet and confer); *Western Aerospace Corp. v. Glowczyk*, 2006 WL 3792658, *1 (W.D. Wash., Dec. 20, 2006) (denying sanctions and admonishing movant for failure to comply with meet and confer requirements); *In re Presto*, 358 B.R. 290, 293 (Bkrtcy. S.D. Tex. 2006) ("It is vitally important that counsel confer with one another in good faith, and so represent to the Court, before taking up court time."); *In re Lentek International, Inc.*, 2006 WL 2986997, *2 (Bkrtcy. M.D. Fla., Sept. 12, 2006) ("Courts should not get involved in discovery disputes until the parties have conferred and reached an impasse.").

Second, the Court must deny Defendants' Motion to Compel because the State has completely and fully responded to the Modeling RFPs and fully provided Defendants with all the considered materials for Drs. Engel and Wells. Moreover, Defendants have all of the tools necessary to run Dr. Wells' and Dr. Engel's models because, in addition to answering numerous specific additional questions posed by Defendants (*see* Exs. C, E, and H), the State provided working copies of the models run by Drs. Engel and Wells on May 15, May 22, and May 29 -- all within the Court's deadlines. Both Dr. Engel and Dr. Wells provided these materials in a file

structure identical to those maintained on their computers. *See* Exhibit J (Engel Decl., ¶ 3); Exhibit K (Wells Decl., ¶ 3). Dr. Engel did not alter the GLEAMS model that he used, nor did he hide codes, alter equations, or make any other changes aside from the generally accepted practice of calibrating the input files. *See* Exhibit J (Engel Decl., ¶ 5). Because Dr. Wells actually wrote the program (which is commercially available and peer reviewed) that he used, he altered the model's source codes and provided those altered codes in a clearly marked file named "sourcecode.zip." *See* Exhibit K (Wells Decl., ¶ 7). There was neither secrecy nor any disorganization in this process. Certainly, an expert is not required to re-organize his files at the whim of the opposing party. The State has gone above and beyond what is generally done to ensure that Defendants have the materials they requested in the Modeling RFPs and subject to production under Rule 26 as expert considered materials. Defendants' Motion should be denied.

Finally, sanctions such as those requested by Defendants' Motion to Compel are unavailable where Defendants have failed to provide a certification of good faith efforts to confer in an attempt to resolve the issue. *See, e.g., Payless Shoesource Worldwide, Inc. v. Target Corp.*, 237 F.R.D. 666, 670–71 (D. Kan. 2006) (denying motion to compel for failure to provide certification of good faith efforts as well as for failure to confer reasonably and in good faith where four-page letter regarding deficiencies was mailed merely four days prior to filing motion to compel). Moreover, sanctions are inappropriate where, as here, there is nothing to compel. Defendants' request for sanctions should be denied.

For the reasons set forth above, the State respectfully requests that the Court deny Defendants' Motion to Compel in its entirety. Moreover, given Defendants' refusal to withdraw its prematurely filed and unfounded Motion to Compel, the State respectfully requests that it be awarded the costs it has incurred in responding to Defendants' Motion to Compel, including the

costs associated with preparing both its Motion to Strike [DKT #1727] and the instant Opposition.

Respectfully Submitted,

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